"Passive Indoctrination" as a Terrorist Offense in Spain – A Regression from Constitutional Rights?

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“Old” Terrorism, “New” Terrorism

Spanish counter-terrorist legislation was originally aimed at fighting local terrorism of a nationalist nature. In Spain, the phenomenon was so present during the constituent process that the Constitution itself included a provision that allows certain fundamental rights to be suspended for specific persons, “in relation to the investigations corresponding to the actions of armed bands or terrorist elements” (art. 55.2 EC –Spanish Constitution-).

More recently, the country, like other Western nations, was confronted with another type of terrorism, of a jihadist essence, which has different characteristics from the previous one. This “new terrorism”, in turn, has evolved since its appearance. It is now common that attacks are carried out by individuals who do not belong to a foreign terrorist group. These persons quickly become radicalized in Europe itself where they have been educated, through a third party or by themselves, before carrying out their terrorist activities autonomously.

Since jihadist terrorism is perceived now as a global threat, many Western countries, even if they have not suffered directly from an attack, have adopted new laws that contemplate this new form of terrorism. Although it can be affirmed that the Spanish legislator is not suffering from “legislation fever” in this context, it has passed some laws regarding international terrorism. This post focuses on certain actions that are now punished in the context of crimes of terrorism in the latest law approved in Spain on this matter, the Organic Law 2/2015 (OL 2/2015). It is a clear example of the turn towards a*preventive* criminal law in the Spanish legal system regarding terrorism, like it has happened in many other countries.

New Actions Punished in the Context of Terrorism

It is interesting to mention a previous law, the Organic Law 5/2010 (OL 5/2010), which set the path followed later on by OL 2/2015, since it expanded the actions that were punishable in the context of terrorism. Both laws were and are aimed at adjusting the national legal system to a series of provisions adopted by international organizations to fight international terrorism.

OL 5/2010 –an amendment of the Organic Law 10/1995, of the Criminal Code- was intended to comply with the requirements of the EU Council Framework Decision 2008/919/JHA of 28 November 2008, which demanded that all States punished the conducts that could be considered as “(a) public provocation to commit a terrorist offence; (b) recruitment for terrorism; (3) and training for terrorism” (art. 3). On the other hand, the objective of the Organic Law 2/2015 –also an amendment of the Organic Law 10/1995, of

the Criminal Code, in the area of terrorist offenses- was to comply with United Nations Security Council Resolution 2178, of 24 September 2014, on threats to international peace and security, which requested States to ensure “the criminal prosecution of all persons involved in the financing, planning or commission of acts of terrorism”.

OL 5/2010 would consider *acts of collaboration* with a terrorist group “the recruitment, indoctrination, training or training aimed at the incorporation of others to a terrorist organization or group or to the commission of any terrorist crime punished in this chapter” (former art. 576.3 of the Criminal Code).

The Organic Law 2/2015 goes even further since it added to the punishable conducts the passive side of indoctrination and training. Specifically, art. 575.1 and 575.2 of the Criminal Code state:

1. Those who, in order to be trained to carry out any of the crimes established in this Chapter, receive indoctrination or military or combat training, or training in the development of chemical or biological weapons, in the elaboration or preparation of flammable substances or explosive or incendiary devices, incendiary or asphyxiating, or specifically designed to facilitate the commission of any such infraction, would be punished with the penalty of imprisonment from two to five years.
2. Those who, with the aim at training themselves to commit any of the offenses established in this Chapter, carry on its own any of the activities provided for in the previous section, would be punished with the same penalty.
   It will be understood that this crime is committed by those who, for this purpose, usually access one or several public communication services online or contents accessible through the Internet or an electronic communications service whose contents are directed or are suitable to incite to the incorporation to a terrorist organization or group, or to collaborate with any of them or in its aims. The facts will be acknowledged as committed in Spain when the contents are accessed from Spanish territory.

   Likewise, it shall be understood that this offense is committed by those who, for the same purpose, acquire or have in their possession documents that are directed or, by their content, are suitable to incite incorporation to a terrorist organization or group or collaborate with any of them or in its ends.

Punishing Passive Indoctrination: a Criticism

The new article, therefore, penalizes not only those who indoctrinate or train a person in order to incorporate him or her into a terrorist organization to commit terrorist acts, but also those who *receive* indoctrination or training for this purpose through a third party or by themselves. The criminal punishment is thus extended to acts that are admittedly still far removed from the actions that properly constitute the terrorist act. This criminalisation tries to tackle the manifestations of this new form of terrorism. The protection of essential legal interests such as life or the maintenance of constitutional order has been put forward to justify the creation of these new abstract endangerment statutes. The legislator assumes that the mere realization of these inchoate acts means by itself a risk for these interests.

I am going to focus on the case of *passive indoctrination*, since it is, in my opinion, more difficult to justify the penalty accorded to it in the current Spanish legislation, both from a criminal and a constitutional perspective.

In fact, the Spanish Supreme Court itself, in its Judgment 354/2017 (STS 354/2017), warned that none of the instruments adopted by international organizations to fight terrorism (such as those mentioned above) contemplate the legal typification of passive indoctrination. The Court understood that these organizations found it difficult to punish activities of a purely ideological content (like receiving jihadist principles and ideas).

Indeed, from a criminal point of view, isn't the action too innocuous to merit such a punishment? The adherence to a specific set of religious principles, through for example the continuous listening or viewing of certain contents, causes a danger too indeterminate to legal assets such as life (of the possible victims of an attack) or the security of the State. On top of it, regarding the intended purpose by the indoctrination, it would be extremely complicated to prove that it is aimed at the commission of a terrorist act from the very beginning.

Moreover, from a constitutional perspective, it is even more doubtful that the current punishment for passive indoctrination is adequate.

If indoctrination is considered the impartment of doctrines or ideas, the inculcation of convictions, it has to be noted that its passive side, that is, the reception of those beliefs, is protected under several fundamental rights, such as freedom of ideology, freedom of religion and freedom of expression. Therefore, the limitation of the right to access those beliefs and to adhere to them must be justified proportionally.

To criminalize the usual access to Internet pages or the possession of documents, only in regards to their ideological ascription, could mean the compromising of those rights. Thus, the punishment could only be justified when the subject of the indoctrination has the aim to learn how to commit a terrorist crime. And that must be confirmed by other indications, as the Supreme Court stated in a later decision, STS 661/2017. In this judgment the Supreme Court again expressed its doubts about the punishment of passive indoctrination, and, as in STS 354/2017, it partially overruled the judgment that had condemned the appellants as responsible for the crime of self-indoctrination.

The Constitutional Court has affirmed that the Spanish system is a non-militant democracy. Citizens may be required to respect the legal system, but not to adhere to it. In this context, the Court considered that freedom of expression is valid not only for the dissemination of ideas or opinions "that are considered harmless or indifferent, but also for those that oppose, collide or disturb the State or any given part of the population". And it also declared that "the consideration of pluralism and the free exchange of ideas as the backbone of the representative democratic system should prevent any activity of the public powers aimed at controlling, selecting or seriously determining the mere public circulation of ideas or doctrines" (STC 177/2015, F J2 [legal basis of the ruling]).

All this said, however, the right is obviously not unlimited. The forms of expression that propagate, incite, promote or justify hatred based on intolerance should be punished. The free exposure of ideas neither authorizes the use of violence to impose one's own criteria

(STC 177/2015, FJ 2 c).

Therefore, the legislator could prosecute these activities, but not the “mere ideological adherence to political positions of any kind, which are fully protected by art. 16 EC [freedom of ideology and religion] and art. 20 EC [freedom of expression]” (STC 235/2007, FJ 9).

Accordingly, the criminal prosecution of an individual who is experiencing a process of radicalization in jihadist thinking by visiting web pages, could only be legitimate from a constitutional point of view if it is accompanied by the incitation and promotion of hatred, or the use of violence to impose his or her ideas.

However, the fact is that the Spanish Constitutional Court has not addressed the constitutionality of OL 2/2015. In the Spanish system of judicial review a law can be challenged in two manners, once it has been enacted. First, through an unconstitutionality appeal by certain subjects entitled within a period of time after the enactment. It can also be questioned afterwards by a judge, if he or she deems that the application of a law raises doubts on grounds of unconstitutionality. An unconstitutionality appeal was not raised against OL 2/2015. Therefore, nowadays the Constitutional Court could only rule on the constitutionality of the offense of passive indoctrination if a judge would question its constitutionality when applying it to a case. Hopefully, this will be done sooner rather than later, so that the Constitutional Court can provide clarity on the constitutionality of this law by rejecting prosecutions of passive indoctrination if this is not accompanied by the incitation and promotion of hatred, or the use of violence to impose his or her ideas.

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